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No. 98-709

IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

Brenda Shempert and Lynne Gibel,
Petitioners,

v.

Harwick Standard Distribution Corporation and
Tom Breckenridge,
Respondents.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Eighth Circuit

REPLY OF THE PETITIONER

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TABLE OF CONTENTS

Pages

TABLE OF AUTHORITIES ii

REPLY OF THE PETITIONER 1

CERTIORARI SHOULD BE GRANTED AS TO QUESTION ONE 1

1. Under the EEOC's procedures, an Intake Questionnaire that satisfies 29 CFR 1601.12(b) constitutes a "charge" 2

2. Petitioner Shempert's Intake Questionnaire constituted a "charge" 3

3. The district court and Eighth Circuit ruled against Petitioner only because her charge was not verified in time 4

4. The Eighth Circuit's holding creates an important and recurring circuit conflict 6

5. Certiorari also is warranted because the Eighth Circuit's decision is erroneous 7

6. The question presented by the Petition is ripe for review in this Court 8

CERTIORARI SHOULD BE GRANTED AS TO QUESTION TWO 9

CONCLUSION 10

TABLE OF AUTHORITIES

Cases **Pages**

Casavantes v. California State University, Sacramento, 732 F.2d 1441 (9th Cir. 1984) 7

Diez v. Minnesota Mining & Mfg. Co., 88 F.3d 672 (8th Cir. 1996) 5, 6, 8

Hodges v. Northwest Airlines, 990 F.2d 1030 (8th Cir. 1993) ..... 5, 6 ,8

Lawrence v. Cooper Communities, 132 F.3d 447 (8th Cir. 1998) 8, 9

Peterson v. City of Wichita, KA, 888 F.2d 1307 (10th Cir. 1989) 7

Philbin v. GE Capital Auto Lease, 929 F.2d 321 (7th Cir. 1991) 7

Price v. Southwestern Bell Telephone Co., 687 F.2d 74 (5th Cir. 1982) 7, 8

Schlueter v. Anheuser-Busch, 132 F.3d 455 (8th Cir. 1998) 7, 8, 9

Whitekiller v. Campbell Soup, 925 F. Supp. 614 (W.D. Ark. 1996) 6

Zipes v. TWA, 455 U.S. 385 (1982) 8

Statutes, Regulations, and Rules

42 U.S.C. 2000e-5(b), (e) 2, 7

29 C.F.R. 1601.12(b) ..... *passim*

REPLY OF THE PETITIONER

CERTIORARI SHOULD BE GRANTED AS TO QUESTION ONE

Respondents are wrong to contend that Petitioners have misconstrued the Eighth Circuit's holding in this case and to assert that the circuits are not in fact divided over whether a complainant's unverified Title VII "charge" may be cured by an untimely, but verified, charge. "Charges" must be filed within 180 days of the last alleged act of discrimination, must contain various information about the allegation of discrimination, and must be sworn or verified. In this case, Petitioner Brenda Shempert ("Petitioner") timely filed an official EEOC "Intake Questionnaire" (also referred to as a "Charge Information" form) which set forth all of the information that the Commission requires to establish a "charge." Although Petitioner did not verify the charge's contents until after 180 days, the EEOC appropriately treated her submission as a sufficient "charge" under its regulations. The Eighth Circuit, however, held that Petitioner's charge was invalid because she failed to verify it within the 180-day period.

Respondents' contrary view of the decision below is erroneous. The Brief in Opposition ("BIO") maintains that this case "is not about Shempert filing an unsworn Charge within the statutory period and thereafter seeking to verify that Charge." BIO 4. Instead, Respondents maintain, the Eighth Circuit affirmed the dismissal of Petitioner's Title VII action because, "[i]n essence," her "Intake Questionnaire was insufficient to satisfy the requirement that a timely *Charge* be filed with the EEOC." *Id.* (emphasis in original). Respondents thus rely entirely on a claimed distinction between the substance of Petitioner's EEOC Intake Questionnaire (which Respondents maintain could not constitute a valid "Charge") and her "Charge of Discrimination" form (which Respondents maintain is the only valid "Charge" under the statute). But as we explain in detail below, Respondents' contention is contradicted by Title VII itself, the EEOC's implementing regulations, the

Commission's conduct in this case, the district court's decision, the holding of the Eighth Circuit, and the uniform decisions of other circuits. In reality, as the Petition explained, the decision below conflicts with the holdings of six other circuits and is erroneous. This Court therefore should grant certiorari.[1]

1. **Under the EEOC's procedures, an Intake Questionnaire that satisfies 29 CFR 1601.12(b) constitutes a "charge."** The Title VII complaint process begins when a complainant files a "charge" with the EEOC. The charge must "be filed within one hundred and eighty days after the alleged unlawful employment practice occurred." 42 USC 2000e-5(e)(1). The statute provides that "[c]harges shall be in writing under oath or affirmation." *Id.* 2000e-5(b). Beyond that direction, however, Congress left it to the EEOC to determine the contents of a "charge." *Id.* 2000e-5(b) (charges "shall contain such information and be in such form as the Commission requires").

The EEOC does not require that a complainant file her "charge" in any particular form. To the contrary, "a charge is sufficient when the Commission receives from the person making the charge a written statement sufficiently precise to identify the parties, and to describe generally the action or practices complained of." 29 CFR 1601.12(b). To facilitate the complaint process, the Commission has promulgated an "Intake Questionnaire," which also is referred to as a "Charge Information" form. *See* EEOC Br. 2, 16. If the Intake Questionnaire sets forth sufficient detail about the complainant's allegations, the Commission may (as in this case) fill out and provide to the complainant a "Charge of Discrimination" form

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[1] Given the fact-specific claims raised by the BIO, we contemporaneously are lodging with the Clerk of this Court a copy of the EEOC's Brief as *Amicus Curiae* in the Eighth Circuit (cited as "EEOC Br."), as well as relevant excerpts from the record below (cited as "Petrs' Lodging"). Moreover, by reviewing the EEOC's Brief, the Court can avoid the substantial delay occasioned by inviting the Solicitor General to file a further brief, which would make it impossible to hear this case this Term. Petitioner's effort to see her day in court already has been delayed for more than three years.

to be signed, verified, and returned. Pet. App. 3a; EEOC Br. 3.[2]

Thus, there is no basis for Respondents' assertion that an "Intake Questionnaire" such as Petitioner filed in this case does not satisfy the requirements of a Title VII "charge." An Intake Questionnaire provides "a written statement sufficiently precise to identify the parties, and to describe generally the action or practices complained of" (29 CFR 1601.12(b)). Respondents' view also is insupportable because the Charge of Discrimination form is derived directly from, and therefore contains *no more information* than,[3] the Intake Questionnaire. Moreover, because the EEOC creates the Charge of Discrimination form on its own timetable, Respondents' construction would leave complainants entirely at the mercy of the Commission to provide that form in time to be returned within the 180-day period. Thus, the EEOC recognized in this case that, because it mailed the Charge of Discrimination form to Petitioner only two days before the 180-day period expired, "it is highly unlikely that Shempert was provided with a formal charge form in time to verify and file it prior to the expiration of the filing period, even though she came to the EEOC in a timely manner." EEOC Br. 18.

2. **Petitioner Shempert's Intake Questionnaire constituted a "charge."** In this case, Petitioner Shempert filed her EEOC Intake Questionnaire within the 180-day period. Pet. App. 3a. The form makes no provision for it to be verified or sworn. *See* Petrs' Lodging, at bates 0104. There never has been any question, however, that the Intake Questionnaire satisfied the requirements of 29 CFR 1601.12(b). As the EEOC explained, "In this case, Shempert's initial submission satisfied

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[2] If the Intake Questionnaire does not provide sufficient information, the Commission presumably may request that the complainant provide additional details in order to establish a sufficient "charge." This, however, is not such a case.

[3] In this case, for example, the Intake Questionnaire submitted by Petitioner "described [Petitioner's allegations] in greater detail than the subsequently filed formal charge." EEOC Br. 8.

the requirements of the regulation." EEOC Br. 5. The Commission thus "treated Shempert's correspondence as a charge—giving [Respondent] Harwick notice on November 20, 1995, that a charge had been received, and assigning a charge number." *Id.* at 2.[4]

Two days before the 180-day period ended, the Commission took the information that Petitioner provided in her Intake Questionnaire and created a "Charge of Discrimination" form, which it sent to Petitioner with the request that she sign and date it. Pet. App. 3a-4a. The form contained only one express reference to the number of the days within which Petitioner was required to act: "[F]ailure to respond or furnish the requested information within thirty (30) days from the date of this letter, may result in your charge being dismissed for failure to cooperate." Petrs' Lodging, at bates 0097. Petitioner did as directed and furthermore verified the form's accuracy in the field provided. *Id.* at 0096. Petitioner did not mail the verified Charge of Discrimination form to the EEOC until sixteen days after the 180-day period had expired. Pet. App. 3a-4a. Under the EEOC's regulations, however, this filing nonetheless cured the fact that her initial Intake Questionnaire was unverified. *See* 29 CFR 1601.12(b) ("A charge may be amended to cure technical defects or omissions, including failure to verify the charge . . . . Such amendments . . . will relate back to the date the charge was first received.").

3. **The district court and Eighth Circuit ruled against Petitioner only because her charge was not verified in time.** The district court dismissed Petitioner's subsequent Title VII action against Respondents for failure to file a sufficient charge

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[4] Respondents' bald assertion that "[i]t is undisputed in the record that at no time during the 180 day charge-filing period did Shempert ever file a Charge – verified or unverified – with the EEOC" (BIO 4) is astonishing and insupportable in light of the EEOC's express position, as quoted in the text. Nor do Respondents allude to a single piece of information required by 29 CFR 1601.12(b) that Petitioner failed to provide in her Intake Questionnaire. Finally, neither the district court nor the court of appeals accepted Respondents' contention.

within 180 days. But contrary to Respondents' contention in the Brief in Opposition, the district court never suggested that Petitioner's Intake Questionnaire failed to provide the information required by 29 CFR 1601.12(b). Instead, the district court recognized that it was bound by Eighth Circuit precedent that "an *unverified* intake questionnaire could not serve as an administrative charge under Title VII" (Pet. App. 16a (citing *Diez v. Minnesota Mining & Mfg. Co.*, 88 F.3d 672, 675 (8th Cir. 1996); *Hodges v. Northwest Airlines*, 990 F.2d 1030, 1032 (8th Cir. 1993) (emphasis added)) although it recognized that "other courts of appeals have ruled to the contrary" (*id.*). The district court therefore refused to follow the EEOC's regulation, under which Petitioner's charge would have been valid. *Id.*

On appeal, the Eighth Circuit affirmed. Petitioner, supported by the EEOC as *amicus curiae*, explained that her Intake Questionnaire provided all the substantive information necessary to constitute a "charge" under 29 CFR 1601.12(b). Pet. C.A. Br. 5-6; EEOC Br. 5. Contrary to Respondents' contention, the court of appeals never doubted that Petitioner's "Intake Questionnaire qualified as an administrative charge because it was a precise statement identifying the parties and describing the discriminatory activities, as required by 29 CFR § 1601.12(b)." Pet. App. 5a. Instead, the Eighth Circuit explained that "Intake Questionnaires *which are neither signed under oath nor verified* do not satisfy the statutory requirement for an administrative charge." *Id.* 6a (emphasis added). As an earlier Eighth Circuit decision explains, that court's rationale is not that Intake Questionnaires lack the substantive information required to constitute a charge, but instead that "intake questionnaires do not satisfy the statutory requirements for a charge *because they are not verified.*" *Diez v. Minnesota Mining & Mfg. Co.*, 88 F.3d 672, 675 (1996) (emphasis added). In fact, the court of appeals in this case explicitly recognized that a *sworn* "Intake Questionnaire" would constitute a sufficient "charge" under the statute. *Id.* ("Only when an Intake Questionnaire is signed under oath can it constitute a valid charge

under Title VII for purposes of the statute of limitations." (emphasis added) (quotation marks omitted)).[5]

4. **The Eighth Circuit's holding creates an important and recurring circuit conflict.** The decision below squarely conflicts with the holdings of other circuits, which have sustained the EEOC's regulation permitting relation back. These circuits hold that a sworn charge will cure a timely but unsworn charge, including an unsworn Intake Questionnaire. *See generally* Pet. 6-8. Just as the district court recognized this conflict (*see supra* at 5), so did the Eighth Circuit: "Other circuits have held that a timely-filed *Intake Questionnaire* can serve as an administrative charge if subsequently verified. Still other circuits have held that an *Intake Questionnaire* qualifies as a charge if it satisfies the requirements of 29 C.F.R. § 1601.12(b)." Pet. App. 6a (citations omitted) (emphasis added). The Seventh Circuit accurately synthesized the state of the law prior to the Eighth Circuit's ruling:

> [T]he central issue in this case is whether the timely Intake Questionnaire in conjunction with the subsequently-filed charge satisfied the statutory time bar for Title VII claims. A number of other circuits have addressed the issue, and *all* have found that the timely-filed Intake Questionnaire which is subsequently

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[5] Nothing in *Whitekiller v. Campbell Soup*, 925 F. Supp. 614 (W.D. Ark. 1996), supports Respondents' contrary position. Respondents read *Whitekiller* to hold that, under Eighth Circuit precedent, "an intake questionnaire filed with the EEOC, not taken under oath, [does] not constitute a valid charge under Title VII." BIO 4. In fact, the district court in *Whitekiller* construed the Eighth Circuit's refusal to permit relation back in *Hodges v. Northwest Airlines*, 990 F.2d 1030 (1993), as dictum. *Whitekiller*, 925 F. Supp. at 616-17. But *Whitekiller*'s reading of *Hodges* proved incorrect. As the district court in this case explained "[t]here is no question . . . that *Whitekiller* conflicts with *Hodges*." Pet. App. 16a n.1. Moreover, the Eighth Circuit's subsequent decision in *Diez v. Minnesota Mining & Mfg. Co.*, 88 F.3d 672, "noting the split of authority on the issue, essentially rejected *Whitekiller* and reaffirmed the view of *Hodges*." *Id.* Importantly, *Whitekiller* expressly recognized that this interpretation of Title VII conflicts with "the overwhelming authority" to the contrary and renders "29 C.F.R. § 1601.12(b) . . . invalid." 925 F. Supp. at 616.

> verified satisfies the statutory requirement that the charge be under oath or affirmation.
>
> . . . . The circuit courts of appeals that have addressed the issue hold that the EEOC has the power to decide that a subsequent verification of a written statement relates back to the date of the initial filing and satisfies the statutory requirement. *See e.g., Peterson v. City of Wichita, Kansas*, 888 F.2d 1307 (10th Cir. 1989); *Price v. Southwestern Bell Telephone Co.*, 687 F.2d 74, 77-78 n.3 (5th Cir. 1982); *Casavantes v. California State University, Sacramento*, 732 F.2d 1441 (9th Cir. 1984).

Philbin v. GE Capital Auto Lease, 929 F.2d 321, 323 (1991) (emphasis added); *see also Peterson v. City of Wichita, KA*, 888 F.2d 1307, 1308-09 (10th Cir. 1989) (as of 1989, "Every circuit which ha[d] considered the issue ha[d] decided in favor of the validity of the regulation, concluding that an unverified charge is a timely filing if it is subsequently amended by a charge executed under oath or affirmation"), *cert. denied*, 495 U.S. 932 (1990). As the Petition noted (at 10 n.10), a panel of the Eighth Circuit in *Schlueter v. Anheuser-Busch*, 132 F.3d 455, 458 (1998), recognized that the view of those circuits "appears well taken," but found that it was "bound by Eighth Circuit case law" to the contrary.

5. **Certiorari also is warranted because the Eighth Circuit's decision is erroneous.** Respondents state in defense of the ruling below only that "[t]he Eighth Circuit fashioned its decision in the instant matter so as not to negate the statutory mandate that a charge of discrimination be under oath or affirmation." BIO 7. That is no answer. All agree that the charge must be sworn or verified. The crucial point is that although Title VII "does require that a complainant verify a charge, the statute does *not* require that the verification take place prior to the expiration of the [180-day] time period." *Philbin, supra*, 929 F.2d at 324 (emphasis added). The purpose of the charge is to provide "an adequate factual basis for the Commission's initiation of the investigatory and conciliatory

procedures contemplated by Title VII." *Price v. Southwestern Bell Telephone Co.*, 687 F.2d 74, 78 (5th Cir. 1982). That purpose is satisfied when the complainant timely files a sufficient charge on the Commission's own form, even though the form makes no provision for swearing or verification. Nor do Respondents contest that the decision below conflicts with this Court's unanimous conclusion in *Zipes v. TWA*, 455 U.S. 385, 396-97 (1982), that Title VII's filing deadlines should be construed liberally in light of the statute's remedial purposes. Given that remedial purpose, deference should be accorded to the EEOC's interpretation that the statute permits the relation back of subsequently verified charges of discrimination.

6. **The question presented by the Petition is ripe for review in this Court.** The conflict in the circuits is clear and acknowledged. The Eighth Circuit has developed its position through five separate decisions,[6] and no further percolation of the issue is required before this Court resolves the division in the courts of appeals. Moreover, the issue recurs frequently: it potentially affects thousands of initially unverified charges filed by complainants each year. Failure to resolve the conflict therefore would interfere substantially with the national administration of Title VII. The Petition also collected (at 9 n.9) more than a dozen district court decisions confronting the issue within the past several years alone. This is a particular concern given that the Title VII complaint process frequently is invoked by individuals proceeding without counsel. Finally, the Eighth Circuit's position is so clearly erroneous that certiorari likely would be granted only in a case from that court in order to reverse. No other vehicle to address the question is apparent.

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[6] Pet. App. 1a; *Schlueter v. Anheuser-Busch*, 132 F.3d 455 (1998); *Lawrence v. Cooper Communities*, 132 F.3d 447 (1998); *Diez v. Minnesota Mining & Mfg. Co.*, 88 F.3d 672 (1996); *Hodges v. Northwest Airlines*, 990 F.2d 1030 (1993).

CERTIORARI SHOULD BE GRANTED AS TO QUESTION TWO

The second question presented by the Petition is whether Petitioner's charge was timely filed under the doctrine of equitable tolling. Respondents recognize that the Eighth Circuit has applied equitable tolling in two decisions that cannot be distinguished from this case. In *Schlueter v. Anheuser-Busch*, 132 F.3d 455, 459 (1998), "the EEOC considered Schlueter's Intake Questionnaire to be a valid charge (or believed that her charge would relate back to the completion of the Intake Questionnaire)." The court applied equitable tolling, explaining: "Whichever of these beliefs the EEOC may have held, they were mistaken, and we will not hold Schlueter responsible for the EEOC's mistake." *Id.* In *Lawrence v. Cooper Communities*, 132 F.3d 447, 451 (1998), "[t]he EEOC believed that, pursuant to § 1601.12(b), the completed charge would relate back to the CIF's [Intake Questionnaire's] filing for timeliness purposes." The court applied equitable tolling because "[a]lthough Lawrence sought the advice of an attorney prior to contacting the EEOC and may have been generally aware of her rights, we find that the EEOC misled Lawrence into reasonably believing that submitting her CIF within fifteen days of the 180-day filing deadline, with subsequent verification, would suffice." *Id.*[7]

There is no basis for applying equitable tolling in *Schlueter* and *Lawrence*, but not in this case. The Commission treated Petitioner's Intake Questionnaire as a charge and has acknowledged mailing the "Charge of Discrimination" form to her only two days before the statutory deadline. EEOC Br. 18. The Commission moreover wrote to Petitioner that she must return the verified Charge of Discrimination form within thirty days, which she did. Although the Commission also wrote that Peti-

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[7] Although it is not a significant point, *Lawrence* and *Schlueter* were decided more than six months before this case. *Contra* BIO 8 (*Lawrence* and *Schlueter* were decided "the same day the Eighth Circuit decided this matter").

tioner was required to comply with the "time limits set by law" (Petrs' Lodging, at bates 0097), certainly she was entitled to rely on the Commission's own binding regulation, which permits relation back of verified charges, as an accurate statement of "the time limits set by law."

We recognize that certiorari usually is not granted to resolve such intra-circuit conflicts. But the holding below also conflicts with long-standing authority from other circuits that equitable tolling applies when a party reasonably relies on an agency regulation. *See* Pet. 10-11. In any event, the refusal of the panel below to apply equitable tolling is bound up with its refusal to permit relation back under 29 CFR 1601.12(b). Thus, if certiorari is granted as to Question One, it should also be granted as to Question Two.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be granted.

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